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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL.,

Appellants,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

FRANKLIN D. TRUEBLOOD,
CRAIG R. JOHNSON,
Counsel for Appellants.

CARL O. OLSON,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 358.

HOOPESTON CANNING CO., A CORPORATION; E. PRITCHARD, INC., A CORPORATION; LANSING B. WARNER, INCORPORATED, A CORPORATION; HARRY M. BROWN AND JAMES T. SMITH, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

Opinions Below.

The opinion of the Court of Appeals of the State of New York is reported in 288 N. Y. 291, the opinion of the Appellate Division in 262 App. Div. 446, and the opinion of the Trial Term in 24 N. Y. S. (2d) 312.

Jurisdiction.

This appeal is taken pursuant to Section 237(a) of the Judicial Code of the United States as amended (28 U. S. C. A., Sec. 344(a)), and Section 1 of the Act of Congress

of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466), from the final judgment of the Supreme Court of the State of New York, Albany County, entered on June 23, 1942 (R. 204), pursuant to the remittitur of the Court of Appeals of the State of New York (R. 201). The appeal was allowed by a member of this Court on August 6, 1942 (R. 215). Reference is made to the Statement as to Jurisdiction filed pursuant to Rule 12 as amended for a concise statement of the grounds on which the jurisdiction of this Court is invoked. This Court noted probable jurisdiction on October 12, 1942 (R. 325).

Statutes Involved.

The statutes involved are certain portions of Section 130; Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421, and Section 422, subsection 1, of the Insurance Law of the State of New York. The pertinent portions of these statutes are summarized in the Statement as to Jurisdiction, beginning at page 2, and the statutes are set out in Appendix A. The objectionable portion of Section 40, subsection 4, alleged in the complaints having been exscinded by the legislature after the commencement of these suits need not hereafter be considered. The statutes indirectly involved in this appeal are set out in Appendix B.

Statement of the Case.

1. Parties.

The appellants, plaintiffs below, are representatives of approximately 976 persons, firms, and corporations in the Canners Exchange suit and of approximately 2100 persons, firms, and corporations in the Warner Reciprocal Insurers suit. These are class suits, under Section 195 of the New York Civil Practice Act, where the questions in each suit are of common or general interest to many persons and those who might have been made parties are very numerous and it was impracticable to bring them all before the Court.

Smith v. *Swormstedt*, 57 U. S. 288, 302.

The defendants are the Superintendent of Insurance and the Attorney General of the State of New York.

2. Proceedings Below.

The appellants, being two separate groups of persons, firms, and corporations exchanging in Illinois contracts of indemnity against loss or damage from fire, and their Attorney-in-Fact, brought their separate actions, later consolidated, in the Supreme Court of the State of New York, Albany County, on November 1, 1939, for a declaratory judgment. By these actions the appellants challenge the validity and applicability to these groups of certain portions of the New York Insurance Law under the Fourteenth Amendment to the Constitution of the United States. Consolidation of the causes was ordered (R. 154). A trial to the Court resulted in a judgment (R. 149) declaring that the State of New York had jurisdiction to regulate appellants' contracts of indemnity, but that certain of the challenged statutes were invalid under the equal protection of the laws clause and the due process clause on the ground

of unreasonable regulation, while certain other of the statutes were applicable and valid. Section 130, the countersignature statute, the Trial Term held to be inapplicable on its face (R. 149). Both sides appealed to the Appellate Division for the Third Department, which Court reversed the Trial Term on the issue of jurisdiction and ordered judgment in favor of appellants (R. 183). The appellees thereupon appealed to the Court of Appeals, which Court reversed the judgment of the Appellate Division and ordered the complaints dismissed (R. 202). A judgment was duly entered in the Supreme Court of New York, Albany County, on June 23, 1942, giving effect to the remittitur of the Court of Appeals, and this appeal is from that judgment (R. 205). A detailed statement of the proceedings below is contained in the Statement as to Jurisdiction on file herein.

3. Statement of Facts.

a. *General Statement.*

The appellants comprise two groups of carefully selected persons, firms, and corporations, known as Subscribers (R. 47), who cooperate in carrying their own fire insurance at actual cost (R. 48). One of these groups is confined to Subscribers engaged in the canning industry, while the other group is limited to Subscribers engaged in the wholesale grocery business and allied lines (R. 46, 51). Insurance is effected by exchanging under the Illinois law (R. 120) contracts of indemnity of a private nature, in which each Subscriber assumes an individual and several liability for his proportionate part of any loss (R. 48). Each Subscriber deposits funds, out of which his liability is paid, and these funds remain his separate property until used or returned. The Subscribers in the canners group have on hand aggregate deposits exceeding four million dollars (R. 46); the Subscribers in the wholesale grocery group

have on hand aggregate deposits of approximately one and one-half million dollars (R. 46). Approximately ten per cent of the Subscribers reside in the State of New York (R. 51), and both groups are licensed in that state (Exhibits 16, 17; R. 71, 280, 281).

b. *History of Groups.*

The original group of canners began carrying their own fire insurance in 1907 (R. 47). Within a short time thereafter this group had expanded to include a majority of the canners throughout the United States and Canada (R. 49, 50). The field from which to select canners eligible for this insurance having always been limited, the number of Subscribers to the plan has not changed materially from year to year (R. 51). Although the list has undergone some change, substantially the same canners who started in 1907 are still with Canners Exchange. The number of Subscribers has continued at all times between nine hundred and a thousand, between ninety and a hundred of whom are in the State of New York (R. 51). In addition to the appellant Subscribers, California Packing Corporation, H. J. Heinz Co., Minnesota Valley Canning Co., without, and Snider Packing Corporation of Rochester, Empire State Pickling Co. of Phelps, Comstock Canning Corporation of Newark, and Curtice Brothers of Rochester, within, the State of New York, have been for many years representative Subscribers (R. 49, 50, 51, 56).

Canners Exchange having proven successful, attention was given to forming a similar cooperative for those engaged in the wholesale grocery business and allied lines. In 1912, therefore, a group of wholesale grocers began carrying their own fire insurance under a plan substantially similar to that employed by the canners (R. 46, 47, 48). The number embracing the plan also increased rapidly at the beginning, although it has remained approxi-

mately twenty-one hundred for a considerable time. Two hundred and thirty of this group are in the State of New York (R. 46, 51). The name of Wholesale Grocery Subscribers, originally used to designate these Subscribers, was in 1926 changed to Warner Reciprocal Insurers, under which designation substantially the same group has continued ever since (R. 46, 51). In addition to the appellant Subscribers, California Packing Corporation, H. J. Heinz Co., H. Kellogg & Sons, Hubbard Grocery Co., without, and Snider Packing Corporation of Rochester, Pepsi-Cola Company of Brooklyn, Seaman Brothers of New York City, and R. C. Williams & Co., within, the State of New York, are representative Subscribers (R. 49, 50, 51).

c. *How the Plans Operate.*

The canner or wholesale grocer who desires to participate in one of these cooperative enterprises obtains an application blank (Exhibits 3, 4; R. 57, 220, 221) and Power of Attorney (Exhibits 5, 6; R. 57, 222, 225) from the office of the Attorney-in-Fact in Chicago. The applicant signs and returns both documents by mail to the office (R. 95). In the event the applicant is accepted, the Attorney-in-Fact executes a contract of inter-insurance, the standard fire insurance policy adapted to this use (Exhibits 7, 8, 9, 10; R. 59, 228, 232, 235, 239), which it delivers to the applicant by placing it in the mail at its office in Chicago (R. 60). An estimate of the amount of the initial deposit is usually enclosed, and this sum the Subscriber forwards by mail. Subsequent deposits are made and held in the same manner as original deposits (R. 60). Virtually all of the contracts of inter-insurance are exchanged by canners and wholesale grocers who are old Subscribers (R. 55). The Power of Attorney is executed but once; thereafter it continues in force until revoked. Once it is executed it forms the basis for the

exchange of all subsequent contracts with the particular Subscriber (R. 112). There is no premium or price charged for this indemnity; the consideration for each contract is the exchange of promises; and the ultimate cost cannot be determined until the end of the particular period covered (R. 62).

Trained insurance engineers employed on a salary basis make such inspection trips out of Chicago as may be necessary. Their principal duty is to inspect outstanding risks, to the end that hazards from fire be diminished (R. 54, 55). They may sometimes explain the plan to a prospective Subscriber, but they have no authority to solicit or negotiate an application or to bind the appellants in any way, as no such power is projected beyond the office of the Attorney-in-Fact (R. 55, 67). They receive no commissions. Although it is possible for an engineer to furnish a blank Power of Attorney to a prospective Subscriber, an officer of the Attorney-in-Fact testified that he knew of no instance where this had ever been done (R. 100, 101).

All matters pertaining to losses, as well as all other affairs between the Attorney-in-Fact and the Subscriber, are transacted by mail (R. 66). This is made possible because of the high degree of trust existing between the Subscriber and Attorney-in-Fact. All adjustments are stated at the office of the Attorney-in-Fact in Chicago (R. 67). In the event of a "very unusual" loss, an inspector, having no authority to make an adjustment, may be sent from Chicago to examine the property. However, the overwhelming number of losses are small ones that are paid as a routine matter without investigation (R. 111). The invariable rule is that all losses are paid by check sent through the mails from the office of the Attorney-in-Fact to the Subscriber sustaining the loss (R. 66). In thirty-five years no suit has ever been brought on a loss in New York State; indeed, no serious controversy has ever arisen between a Subscriber and the Attorney-in-Fact respecting

such loss (R. 112). All performance under the contract of inter-insurance and the Power of Attorney, as the Appellate Division found, takes place in Illinois (R. 182).

d. *Financial Standing of Groups.*

The financial standing, the fairness and equity observed throughout the years in the payment of losses, the integrity, efficiency and economical management of these groups are not open to question. The Trial Court found that both groups "have built up the highest reputation for financial soundness, fair dealing, and the prompt payment of claims" (R. 123). As early as 1916 the founder reported to the National Canners Association (Exhibit 21; R. 73, 314C) that "there is absolutely no question • • • (that) any honest loss sustained by Canners Exchange Subscribers will be paid. We have more actual assets back of our policy than any stock company doing business, and our cash assets, available for losses, are very much larger in proportion to the amount involved than are the cash assets available for losses of any stock company." In 1937 the report of examination of the affairs of the canners group conducted under the convention of insurance commissioners of the several states (Exhibit 19; R. 72, 300) reported that "The cash position of the Exchange is excellent and all investments are of a high grade," that "The Exchange is efficiently managed as is evident by its sound financial condition," and that "Subscribers are afforded good treatment and contractual obligations are fairly discharged." This same convention in reporting on its examination of the affairs of the wholesale grocers group in 1937 found that (Exhibit 18; R. 72, 284) "The Exchange is in sound financial condition with an excellent cash position. Its assets are of a high grade and can readily be turned into cash to meet any emergency which may arise," that "all contractual obligations are taken care of promptly and in accordance with the provisions

of the agreements," and that the affairs of the exchange are managed "in an economical and efficient manner."

At the end of 1938 the aggregate deposits of the canners group exceeded four million dollars, those of the wholesale grocery group, nearly one and a half milion. The great bulk of these assets consist of United States government securities and the rest of cash in banks (Exhibits 14, 15; R. 71, 265, 275).

e. *Economy of Cooperatives.*

The courts below have found the cost of this cooperative indemnity to be from thirty to fifty per cent lower than comparable insurance would cost if the Subscribers purchased it from companies engaged in the business of insurance (R. 156, 188). In general there are two reasons for this economy: (1) The Subscribers insure themselves at actual cost without using the expensive agency system employed by stock companies,[1] the elimination of which, statistics show, effects a saving of at least twenty-five per cent of the cost of this insurance[2] (R. 75); (2) The loss ratio is far lower than those of the stock companies. Without the agency system there is no indiscriminate acceptance of risks by a resident agent whose principal thought is to earn a commission. There is no conflagration hazard, risks being scattered (Exhibit 21; R. 75, 76, 156).

The founder of these exchanges, Mr. Lansing B. Warner, reported to the National Canners Association in 1916 (Ex-

1. In *Matter of Northwestern National Insurance Company* v. *Pink*, 288 N. Y. 359 (1942), it was stated in a dissenting opinion concurred in by Conway, J. that "The payment of commissions constitutes a substantial percentage of acquisition costs, which in turn determine premium rates."

2. The agency expense for all stock companies for the year 1941 averaged 26.2 per cent of the cost of the insurance. *Best's Insurance News (Fire and Casualty Edition)*, Vol. 43, No. 7, p. 16, November, 1942.
Compare the economy made possible in savings-bank life insurance by the elimination of the agency system. See *Study of Legal Reserve Life Insurance Companies*, T. N. E. C. Monograph No. 28 (1941) p. 310, where it is stated that, "The principal reasons for the low cost of savings-bank life insurance is, of course, that the savings banks do not incur agency expenses."

hibit 21; R. 73, 314C) that "Our record, so far as savings are concerned, speaks for itself. In eight years actual cash savings, as compared with the cost of the same amount of insurance if placed with stock companies, have amounted to more than $600,000, and, in addition to this, we have been instrumental in having the average rates on canning factories throughout the United States reduced twenty per cent, and the $600,000 saving above referred to is in addition to this twenty per cent rate reduction. This twenty per cent reduction, we estimate, means nearly $400,000 saving to the industry per annum"; that the plan "is an object lesson in cooperation * * * with losses paid of nearly one million dollars and with savings direct and indirect amounting to from one to two million dollars and with the improved insurance conditions now existing as compared with eight years ago."

For the year 1938 alone the members of the canners group saved an aggregate of $922,000 over the amount their insurance would have cost if obtained from stock companies, while the comparable saving for the Wholesale Grocery group was $286,000 (Exhibits 15, 14; R. 71, 256, 248).

f. *Comparative Insurance Costs.*

Exhibit 26 (R. 74, 318) is an analysis of income and disbursements of five of the outstanding fire insurance companies compared with the Canners groups for the year 1938 (R. 74). These companies—Aetna Insurance Co., The Home Insurance Co., Great American Insurance Co., Hartford Fire Insurance Co., and Insurance Company of North America—showed an average loss expense of 44.2 per cent for 1938 as against a 23.5 per cent loss expense for Canners Exchange. The five companies also showed an average operating expense for the same year of 47.9 per cent compared with total operating expenses (including compensation to the Attorney-in-Fact and taxes) of

28.4 per cent for the cooperative. As against an average dividend paid to the stockholders of the five companies of 7.9 per cent the savings returned to Subscribers amounted to 48.1 per cent.

Likewise Exhibit 25 (R. 74, 317) is a comparison of figures for the wholesale grocery group with those for the same five stock companies for 1938 (R. 74). Against an average loss expense for the stock companies of 44.2 per cent the wholesale grocery group showed a loss expense of 16.9 per cent; against the average operating expense of the stock companies of 47.9 per cent the total expenses (including compensation to the Attorney-in-Fact and taxes) of Warner Reciprocal Insurers was 27.2 per cent; and as against an average dividend of the stock companies paid to stockholders of 7.9 per cent the savings to the members of the cooperative amount to 55.9 per cent. The official records for subsequent years were not available at the time of the trial.

g. *Licenses of Groups.*

Each group is licensed (Exhibits 1, 2; R. 53, 218, 219) to exchange contracts of inter-insurance in Illinois by the Director of Insurance of that state. Although all contracts are exchanged in Illinois and none are, or ever have been, exchanged in New York, each group has been licensed (Exhibits 16, 17; R. 71, 280, 281) by the Superintendent of Insurance of that state since 1930. Taxes have been paid regularly to New York since the enactment of the taxing statute in 1936 (Exhibit 22; R. 73, 315). The Superintendent is appointed agent for the service of process.

h. *Effect of New York Statutes.*

As these plans have been worked out over a period of many years they present to the Court a delicately balanced system of self-insurance of unprecedented efficiency. The evidence is undisputed that the application of the challenged statutes to them would throw the plan upon which they operate out of balance, create inequities among Subscribers, increase the cost materially, deny to a great number the right to participate, and lead to the ultimate destruction of both cooperatives (R. 77-83). The effect of the enforcement of each particular statute upon these groups is considered in detail under Points II and III, beginning at page 38 of this brief.

Specification of Errors.

The Court of Appeals of the State of New York erred in the following respects, to-wit (R. 211):

1. In reversing the final order of the Appellate Division, Third Department, entered on September 2, 1941, and in ordering the complaints dismissed.

2. In refusing to hold that the statutes alleged in the complaints, and each of them, are invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to regulate, interfere with, and prohibit appellants' contracts of inter-insurance made and to be performed outside the State of New York, and thereby deprive appellants of their liberty and property without due process of law (R. 211, 212, 213).

3. In refusing to hold the aforesaid statutes, and each of them, invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations upon appellants' contracts of inter-insurance that are

unreasonable, arbitrary, and capricious without any reasonable relation to the end sought to be attained, and thereby deprive appellants of their liberty and property without due process of law (R. 213).

4. In refusing to hold that Sections 412, subsection 1, 417, subsection 1, and 415, subsection 1, of the aforesaid statutes violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations and prohibitions upon appellants' contracts of inter-insurance that are discriminatory against appellants, and thereby deprive them of the equal protection of the laws (R. 213, 214).

5. In refusing to hold that the State of New York may not attach a condition to appellants retaining their New York licenses by requiring them to submit to the purported regulations and prohibitions of the statutes alleged in the complaints, and each of them, which statutes violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in the manner set out in paragraphs 2, 3, and 4 hereof (R. 214).

Summary of Argument.

Point I. The statutes are invalid and inapplicable on the ground of jurisdiction under the due process clause. Appellants' contracts are personal contracts of indemnity made and to be performed in the State of Illinois. The mere fact that payment of indemnity in Illinois is dependent upon the condition of loss or damage to property in New York, or that the owner of the insured property resides in New York, does not affect the Illinois jurisdiction to regulate these contracts. Appellants' contracts of inter-insurance, being inter-related, must all be construed in accordance with the Illinois law regardless of the location of the property or the residence of the Subscriber. The application of diverse state laws to appellants' contracts would throw the entire system out of balance and lead to the ultimate destruction of the plan.

Point II. Certain sections of the New York Insurance Law, notably Section 412, subsection 1, which denies to citizens who do not have a net worth in excess of ten thousand dollars the right to participate in this indemnity, are invalid and inapplicable under the equal protection of the laws clause.

Point III. The statutes are invalid and inapplicable on the ground of unreasonable regulation.

ARGUMENT.

POINT I.

Jurisdiction.

Under the due process clause the State of New York is prohibited from exercising jurisdiction over appellants' contracts of inter-insurance.

All of appellants' contracts of inter-insurance (Exhibits 7, 8, 9, 10[1]; R. 59, 228, 232, 235, 239) are and always have been made in Illinois. No contracts have ever been made in New York (R. 60, 163).

The Appellate Division, in approving the finding of the Trial Court (R. 163) that the contracts are "as a matter of law, Illinois contracts of insurance," said (R. 189, 190):

> "Applications are received, policies are issued and losses are paid in the State of Illinois. • • • Contracts between them (appellants) and others, entered into in the State of Illinois, must be governed by the laws of that state."

These findings were not impugned by the Court of Appeals (R. 196, 197).

The contracts, being made in Illinois, are governed by Illinois law, not by New York law. Being valid in Illinois the contracts are valid in all other states, including New York. Due process requires the application of Illinois law to them.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.
Home Ins. Co. v. *Dick*, 281 U. S. 397, 407, 408 (opinion by Brandeis, J.).

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1. Exhibits 7 and 9 are the so-called old New York standard contracts adapted for use by Warner Reciprocal Insurers and Canners Exchange Subscribers respectively, while Exhibits 8 and 10 are the so-called new New York standard contracts adapted for use by these groups. The two types of contracts contain substantially the same provisions.

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 347 (opinion by Holmes, J.).

Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140, 145.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

Knights Templars' Indemnity Co. v. *Jarman*, 187 U. S. 197, 204.

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 453.

Marine Ins. Co. v. *St. Louis, etc., Ry. Co.*, 41 Fed. 643, 653.

It is necessary that all of appellants' contracts, regardless of the location of the property or the residence of the Subscriber, be governed by Illinois law (R. 77). The Attorney-in-Fact executes every contract on behalf of all of the Subscribers (Exhibits 5, 6; R. 58, 223, 226); therefore every Subscriber is a party to every contract. A network of inter-related contracts is thereby created among the Subscribers who are scattered throughout the United States, Canada, and elsewhere. Every Subscriber, regardless of residence or location of the property, pays the same proportional part of every loss (R. 47, 48), and it obviously would be unfair if the rights, for example, of a New York Subscriber, were determined by more favorable laws than those determining the rights of a Subscriber in another jurisdiction, or vice versa. If the laws of the various jurisdictions were to be applied to these contracts, inequalities and inequities among the several Subscribers would be inevitable (R. 77). If New York is to be given the right to regulate appellants' contracts, other states, paradoxically, have the same right. The door would thus be opened to all manner of conflicting regulations. It is the unchallenged opinion of one of appellants' officers that the

subjection of appellants' contracts to the varying laws of the different jurisdictions would result in the ultimate destruction of this system of insurance, and appellees have not suggested any reason for exposing these groups to this danger (R. 77).

The rule which requires appellants' contracts to be uniformly interpreted under a single standard is stated in *Royal Arcanum* v. *Green*, 237 U. S. 531, 542, approved in *Modern Woodman* v. *Mixer*, 267 U. S. 544, 551, in an opinion by Holmes, J.

Illustrating the rule further is *Taggart* v. *Wachter, etc., Inc.*, 179 Md. 608, 618, 619, where the Maryland Court of Appeals applied a uniform standard of law to a quasi-reciprocal exchange. The Court said:

> "The same result (the application of the law of Pennsylvania, in which state the contracts were exchanged) would seem to follow from the requirement arising from the reciprocal, cooperative nature of the enterprise, that all policy holders be affected alike. *Royal Arcanum* v. *Brashears*, 89 Md. 624, 631, 43 A. 866. This, which could be assured only by the application of the laws of one jurisdiction would be an implied undertaking of subscribers, for they intended dealing and being dealt with on one uniform basis, and all that affects the subscribers as a whole must be determined upon and ordered by one authority to accomplish that. 'Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by resorting not to

one source of authority applicable to all, but applying many divergent, variable, and conflicting criteria." *Supreme Council of Royal Arcanum* v. *Green*, 237 U. S. 531, 541, 35 S. Ct. 724, 727, 59 L. ed. 1089, L. R. A. 1916A, 771; *Wardle* v. *Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511."

We submit that the payment of losses "affects the Subscribers as a whole" and therefore "must be determined upon and ordered by one authority." Nor can there be any question that the Subscribers "intended dealing and being dealt with on one uniform basis."

The doctrine of the preceding cases was applied to group insurance by this Court in *Boseman* v. *Conn. Gen. Life Ins. Co.*, 301 U. S. 196, 206, the language being:

> "The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the making and delivery of the contract of insurance in that State, the declaration in the policy that Pennsylvania law shall govern and petitioner's acceptance of the insurance according to the terms of the policy but also by the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided."

It is apparent that appellants' contracts (Exhibits 7, 8, 9, 10; R. 59, 228, 232, 235, 239) differ from those of corporate insurers. As to the latter, only the insurer and insured are parties, and no other person is directly interested in them. A particular contract is not inter-related with all of the remaining contracts. The corporate insurer's contract is usually countersigned and delivered by a resident agent in the jurisdiction where the insured resides or the property is situated, and is therefore subject to local law. Usually all activities under such contracts take place within the local jurisdiction, including the adjustment of losses. It is thus apparent that ordinarily

no necessity exists for interpreting such contracts according to a single uniform standard of law.

The State of New York has expressly recognized the necessity for applying a uniform standard to all Subscribers by providing in Section 415, subsection 1 (Appendix A), of the Insurance Law that "every Subscriber's agreement (Power of Attorney) shall be identical in terms * * * with all other Subscriber's agreements currently in force." If the requirement of this section is to be met, it follows that were New York to be allowed to regulate any of appellants' contracts, the state must be allowed to regulate all of them, including the contracts upon risks in other states.

In addition to the foregoing, all performance under appellants' contracts of inter-insurance takes place in Illinois (R. 122), and the Appellate Division expressly found (R. 182) that the said contracts are not performed in the State of New York, the finding having been acquiesced in by the Court of Appeals (R. 196, 197).

Western v. Genesee Mutual Ins. Co., 12 N. Y. 258, 262.

Clay Fire Ins. Co. v. *Huron Salt Co.*, 31 Mich. 345, 354.

Connecticut Fire Ins. Co. v. *Way*, 62 N. H. 622, 623.

It is immaterial that the standard forms of policies adapted for use by appellants (Exhibits 7, 8, 9, 10; R. 59, 231, 233, 238, 240) grant the theoretical right to require a Subscriber to furnish a certificate of a notary or plans of a destroyed building, or to submit to an examination under oath in respect to a loss. In the entire history of appellants' groups these requirements have never been invoked (R. 110). But even if the Subscribers were required to comply with these provisions, which they are not, there would still be no performance in New York state.

(1) The Illinois jurisdiction over appellants' contracts is not affected by acts in the State of New York.

The appellants employ approximately twenty-six trained insurance engineers, who contribute largely to the success of this inter-insurance (R. 54). From complete records, charts and plans of the insured properties kept in its office the Attorney-in-Fact obtains up-to-the-minute information regarding all risks. If a faulty or dangerous condition develops in one of these it can usually be corrected by letter or telephone. However, when the necessity arises, an engineer will go from the office to view the property and counsel with the owner regarding the minimizing of the hazard from fire. He may also explain the plan of self-insurance to the infrequent prospective Subscriber (R. 54, 55, 92, 188, 189). In visiting a risk the engineer ascertains the moral hazard by observing the "housekeeping" of the Subscriber. For example, if the risk is near a railroad the engineer learns whether the weeds and grass around the plant have been cut so as to avoid the hazard from locomotive sparks (R. 98), or he may recommend that fire walls or wire glass windows be installed (R. 54). Inspections of new properties are necessarily infrequent. The engineers have no authority to solicit new Subscribers, or to bind appellants in any way (R. 189). Nor does the engineer make inquiries in the field regarding the credit standing or reputation of an applicant (R. 98). The engineers receive no commissions, being employed on a salary basis.

Because stocks of canned goods and groceries as they accumulate are ordinarily stored in buildings and warehouses, the plans and specifications of which are on file in the office of the Attorney-in-Fact, there is usually no necessity for inspecting such goods before coverage.

As to losses, the overwhelming majority are small ones that are paid without inspection upon proof of loss sent

in by the Subscriber (R 111). However, in the event of a "very unusual" loss, an inspector who has no authority to bind appellants or make an adjustment is sent out from Chicago to view the property to determine the extent as well as the cause of the loss in order that future losses from the same cause may be avoided (R. 111). Since only one-tenth of the total number of Subscribers reside in New York State (R. 46, 51), the relative number of losses in that state requiring inspections is very small. Losses are never adjusted in New York State; all adjustments are stated at the office of the Attorney-in-Fact in Chicago and are paid by check mailed to the Subscriber from that place (R. 66, 67). It is plain that there is no adjustment of losses in the sense that stock companies adjust them.

We assert that the Appellate Division correctly stated the law applicable to the activities of appellants' engineers (R. 189, 190). It said:

> "These acts are wholly consistent with the right of a resident to secure a foreign contract of insurance, a right which is supported by an impressive array of authorities (*Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Compress Co.* v. *Arkansas*, 260 id. 346; *Aetna Life Ins. Co.* v. *Dunken*, 266 id. 389; *Minnesota Association* v. *Benn*, 261 id. 140; *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277; *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 id. 32; *Stone* v. *Penn Yan, K. P. & B. Railway*, 197 id. 279.) If this right may be abridged merely because of the inspection of risks and appraisal of losses here, then it is a right in theory only and of no practical value. The cases cited, however, emphasize the fact that situs does not confer upon the State the power to regulate. The necessary corollary to this doctrine is that inspections and appraisals, which have to do with the situs, do not confer such jurisdiction."

The Court of Appeals did not dissent from these views. Additional authorities (except the *Benn* case) holding various types of acts within the state insufficient as basis

for assumption of jurisdiction to regulate contracts entered into outside the state:

(a) Inspection of risks or losses.

Sasnett v. *Iowa State Traveling Men's Ass'n.*, 90 F. (2d) 514, certiorari denied 302 U. S. 711.

Kasprzak v. *Mutual Life Assur. Co. of Canada*, 1 F. Supp. 915.

French v. *People*, 6 Colo. App. 311.

People ex rel. McCall v. *Gilbert*, 44 Hun. (51 Sup. Ct.) 522, 524.

(b) Explaining transaction to prospective insured.

Palmetto Fire Ins. Co. v. *Beha*, 13 F. (2d) 500, 510.

(c) Handing prospective insured an application blank.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 144.

Connecticut Fire Ins. Co. v. *Way*, 62 N. H. 622, 623.

(d) Solicitation.

Green v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 533.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143, 145.

Hyde v. *Goodnow*, 3 N. Y. 266, 271.

Western v. *Genesee Mutual Ins. Co.*, 12 N. Y. 258, 262.

Mas v. *Owens-Illinois Glass Co.*, 34 F. Supp. 415, 421.

(e) Recommendation by Subscriber.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143.

Because of the highly specialized nature and the high type of risks insured and the professional methods used by appellants' engineers (R. 54, 55, 76), what these engineers do is far different from the usual "servicing" of

risks by stock companies, particularly casualty risks, where a rigid, continuous system of inspection is necessarily employed by the insurer to guard against ever-changing circumstances that constantly menace the safety of the insured premises and the lives of the employees, typified in the elaborate and intricate system of "servicing" of the Virginia casualty contracts in *Osborn* v. *Ozlin*, 310 U. S. 53, hereinafter discussed.

Appellants contend that as citizens of the United States their engineers "have the right to pass and repass through every part of it without interruption" (*Crandall* v. *Nevada*, 73 U. S. 35, 49, per Miller, J.; see also *Edwards* v. *California*, 314 U. S. 160), including the right to pass into New York State to inspect property in connection with insurance contracts entered into outside of the state without thereby subjecting appellants to far-reaching jurisdictional consequences.

It is plain that the presence or absence of contract within the state seeking to regulate is the determinative factor in the above cases—the doing of business for the purpose of regulation. Generally speaking, insurance business is the making of contracts, *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 204, and a state seeking to regulate such business cannot reach the contracts which constitute it unless the contracts have their situs within the state. If a state other than the state in which the contracts are made were permitted to regulate the contracts, such regulation would be an infringement upon the jurisdiction of the state of the *lex loci contractus*. The findings of the lower courts that appellants' contracts are made in Illinois therefore seems conclusively to prohibit jurisdiction in New York to regulate them. No case has been cited by opposing counsel where jurisdiction to regulate has been upheld in the absence of contract within the state. Proof of a course of making contracts, as dis-

tinguished from proof of isolated transactions, is generally required.

We also note that courts have upheld jurisdiction for service of process where the same circumstances would not warrant upholding jurisdiction to regulate. In the language of Cardozo, J., "activities insufficient to make out the transaction of business, within the meaning of those statutes (regulating foreign corporations), may yet be sufficient to bring the corporation within the state so as to render it amenable to process." (*Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267.) And again, the same judge stated that "business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license." (*International Text Book Co.* v. *Tone*, 220 N. Y. 313, 318.) Thus the Court has upheld service of process in cases (*Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245) where the agent of a non-resident insurance corporation was present within the state clothed with the authority to enter into contracts of adjustment, although there was no proof of specific contracts having been entered into with the state. The Appellate Division in the instant case expressly found that no authority to bind is ever projected into the State of New York (R. 189).

In concluding this part of our discussion, we assert by way of summary that no contracts are ever made or countersigned within the State of New York; that appellants have no office in the state, no general or special agents, no district manager or other impedimenta therein; that there is no carrying on of an elaborate system of solicitation in New York, no commissions paid, no advertising, no employees, no incidental contracts, no bank accounts in the state, and that activities generally are localized in Chicago.

(2) The fact that appellants are licensed by the State of New York has no bearing on the question of jurisdiction to regulate.

At the time of the issuance of the New York licenses by Superintendent Conway in 1930 it was known that appellants' contracts were made in Illinois, and it was understood that they would continue to be made in that state. No attempt was ever made by the New York Department to regulate these contracts until the state amended its Insurance Law in 1939, when the threat of regulation was first made. Because of the long existence of these licenses, it would be dangerous to the reputation of appellants' cooperatives to surrender them. (Patterson, *The Insurance Commissioner in the United States*, pp. 90, 91.) The State of New York now seeks to take advantage of a situation it helped create by attempting at this late date to change the entire theory upon which the licenses were granted. In 1936, when the first countersignature statute was enacted, no attempt was made to force appellants to bring their contracts within the state for countersignature (R. 75).

Since the enactment of the taxing statutes of 1935 (substantially re-enacted as Section 552 of the Insurance Law of 1939) appellants have paid taxes to the State of New York measured by net deposits of New York Subscribers in the amount of several thousand dollars each year. This seems a high annual fee when we consider that all the Insurance Department does in return is audit the statements filed by appellants each year.

The appellants assert that the State of New York has in effect demanded that appellants either submit to the extraterritorial operation of the challenged statutes or give up their licenses. But it is axiomatic that a state may never compel a licensee to give up rights guaranteed by the federal constitution in order to obtain or retain a license.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494, 507.

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, 434 (opinion by Holmes, J.).

Terral v. *Burke*, 257 U. S. 529, 532.

Palmetto Fire Ins. Co. v. *Conn*, 272 U. S. 295, 304 (opinion by Holmes, J.).

Although we made the above contention in the Court of Appeals, that Court wholly misconceived the argument, as shown by the statement in the opinion that we contended that although appellants were authorized to do business in New York, since they did no business in the state they must be treated as though unauthorized (R. 198). We never addressed that argument to any court and take this means of repudiating the imputation.

(3) Neither the location of the insured property nor the residence of the Subscriber in New York State can afford any basis for regulation by New York of appellants' Illinois contracts.

There can be no question under the authorities in this Court, as well as under the authorities generally, that neither the situs of the property nor the residence of the Subscriber in New York can afford any basis for the claim that New York has the jurisdiction to regulate these contracts. Moreover, the jurisdiction being in Illinois, a uniform standard of interpretation is assured. The application of any other rule would result in a conflict with the federal constitution.

An excellent statement of the general rule is found in *Clay Fire Ins. Co.* v. *Huron Salt Co.*, 31 Mich. 345, 354, where Groves, C. J., in an opinion concurred in by Campbell and Cooley, JJ., said as follows:

> "The contract was personal and not real, and although it had relation in a certain sense to realty, it

was not operative upon the estate, but merely as an agreement to pay money in case the erections, or other property specified, should be damaged by fire. The circumstance that the liability to pay was made to depend upon an event to real property here, did not make the contract a Michigan contract, or in any legal sense make the state the place of performance by the insurance company. And the further circumstance, that the contractee was a Michigan corporation, did not impress upon the contract the quality of locality, so as to cause our laws in regard to business done here by agents of foreign companies to affect it in point of law."

Cases in this Court which present the application of the foregoing principle in varying aspects under the due process clause are:

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

Home Ins. Co. v. *Dick*, 281 U. S. 397, 407, 408 (opinion by Brandeis, J.).

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346 (opinion by Holmes, J.).

Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140, 145.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

New York Life Ins. Co. v. *Dodge*, 246 U. S. 357, 373.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

A three-judge District Court sitting in the Southern District of New York in construing a prior New York statute recognized the constitutional safeguard as applying to a New York resident insuring property within the limits of the state by means of contracts entered into outside.

Palmetto Fire Ins. Co. v. *Beha*, 13 F. (2d) 500, 504.

This case was cited with approval in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 436, in an opinion by Holmes, J.

Although the above rule has been settled in New York by a long line of decisions beginning with *Hyde* v. *Goodnow*, 3 N. Y. 266, 271, and including *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277, 281, and *People ex rel. Sea Ins. Co.* v. *Graves*, 274 N. Y. 312, the Court refused to apply it to the instant case.

(4) The Court of Appeals wholly failed to apply the limitations of due process in the case at bar.

The Court of Appeals, ignoring the applicable authorities, found that appellants were doing business in New York and therefore subject to regulation (R. 197). Of course, conclusions of state courts as to mixed questions of law and fact may never be invoked to deprive suitors of rights guaranteed by the federal constitution.

First National Bank v. *Hartford*, 273 U. S. 548, 552, 553.

Provident Savings Life Assurance Society v. *Kentucky*, 239 U. S. 103, 112.

The decision of the Court of Appeals is based (R. 197) upon the definition of Section 41, subsection 3(a), of the Insurance Law (Appendix B) which defines an insurance business as "the making, as insurer, or proposing to make as insurer, of any insurance contract." In attempting to distinguish the Subscriber in his capacity as "insurer" from the "situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign state," where admittedly there is no jurisdiction to regulate, the Court says that the insurer (prospective Subscriber) signs a Power of Attorney in New York and confers thereby

power upon the Attorney-in-Fact to execute for him a contract of insurance so that he may become the insurer of hundreds of risks throughout the United States and Canada; that it matters not where the contract creating the obligation to pay the indemnity is made because "our resident is an insurer."

Needless to say no authorities are cited for so remarkable a proposition.

That the holding of the Court is based upon fallacious reasoning is readily demonstrable. The decision is necessarily based upon the untenable ground that the constitutional privilege here claimed does not extend to an insurer. The following are representative of cases in which the rights of the insurer under the due process clause were upheld and enforced.

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

In the mutual benefit case of *Minnesota Commercial Men's Ass'n.* v. *Benn*, 261 U. S. 140, 143, 145, the constitutional privilege here claimed was enforced on behalf of the members of the association, each of whom stood "in the peculiar situation of being a party to both sides, insurer and insured." (*Korn and Wisemiller* v. *Mutual Assurance Society*, 10 U. S. 192, 201.)

The above language applied to members of a mutual association applies as well to the Subscribers in this inter-insurance. Nevertheless, the Court misplaced the emphasis. The primary object of an applicant desiring to participate in this indemnity is to save up to fifty per cent in his insurance costs, not to engage in the insurance business. Moreover, if the applicant sending in the Power of Attorney should be rejected, it cannot reasonably be said that during the pendency of his application he has

been engaged in the insurance business. If the applicant is accepted, however, the resulting contract comes into being, not in New York, but in Illinois, the state of acceptance.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143, 144.

In *Hartford Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, a bald attempt had been made by the State of Mississippi to avoid the limitations of due process. The state had enacted a statute that provided that "all contracts of insurance on property, lives, or interests in this state shall be deemed to be made there." But the Supreme Court of Mississippi, refused to hold the statute invalid, saying, "when the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated." This Court denounced the attempt to strike down the constitutional right, stating (p. 149):

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York L. Ins. Co.* v. *Head*, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879, *Aetna L. Ins. Co.* v. *Dunken*, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701."

We submit that there is no difference in principle between the above case and the case at bar.

The Court of Appeals limited its law to a case in the District Court, *Fireman's Ins. Co.* v. *Beha*, 30 F. (2d) 539 (affirmed on a procedural point in *Fireman's Ins. Co.* v. *Conway*,[1] 278 U. S. 580), where the insurance contracts were admittedly entered into within the State of New York and there was no question as to the jurisdiction of the state over them. The sole issue in that case was whether the state could require a non-resident insurer licensed and doing business in New York to conform to the financial requirements imposed upon domestic insurers as a condition to the retention of its license, although acts in relation thereto might be required of the insurer outside of the state. The Court answered this question in the affirmative. The case is not in point, nor did the appellees deem it of sufficient importance to cite in any of the courts below.

The Court of Appeals, implying that appellants derive a pecuniary or economic benefit from their New York licenses (R. 198), asserts that because of these licenses the Subscribers know that the minimum capital and the assets of the insurers must be substantially the same as those of domestic insurers, citing Sections 42 and 90 (Appendix B) of the Insurance Law. "These considerations" says the Court, "are helpful competitively in obtaining insurance business."

The element of competition cannot be present where the property owners simply carry their own insurance. It is as true today as it was in 1916 when the founder of these cooperatives in addressing the National Canners Convention said (Exhibit 21; R. 73, 314B):

"Another thing I wish to impress upon you is that

1. Albert Conway, having succeeded James A. Beha as Superintendent of Insurance of New York, was substituted as a party defendant in the Supreme Court of the United States. He was later elected to the Court of Appeals and wrote the opinion in the instant cause in the court below. As Superintendent of Insurance Judge Conway heard and passed upon appellants' applications for licenses in 1930.

Canners Exchange is cooperative and not competitive. It is not in competition with anyone or any insurance company. It is a plan for the canners to carry their own insurance and to pay only the cost. The United States Steel Corporation, the Standard Oil Company and other large corporations, we understand, carry a large part of their own insurance. They feel that they have a large enough number of separate risks to create an average and think they can therefore better afford to stand a loss now and then than to pay premiums on all their risks, and if they have a proper average they can. Because they do this, are they in the insurance business or are they in competition with the stock companies? Of course, not. They are simply carrying their own insurance. This is exactly what you canners are doing, except that no one of you have enough separate risks to make an average, so you join together at the office of Canners Exchange and accomplish the same result. You can really see that there is no competition, but you are merely securing your insurance at what it costs."

These remarks apply with equal force to Warner Reciprocal Insurers. Neither plan has ever been changed.

There has been no material increase in Subscribers during the past decade (R. 126, 142). The increase in deposits made by New York Subscribers (R. 141) therefore necessarily reflects the increased insurance needs of Subscribers for the period, and the taking out of the licenses had nothing to do with the increase. The enlarged volume of deposits is readily explained. Stocks of canned goods and groceries constitute the bulk of the insured property. The size and value of these stocks vary with the times, depending upon crops, economic conditions, markets, and other factors. The bottom of the cataclysmic depression having been reached early in the 1930s, values of canned goods and groceries, as well as of buildings and equipment, were unprecedently low. But as business conditions improved, inventories increased, both in amount and value. Appel-

lants' insurance coverage, and therefore the deposits, increased in proportion. This was true in New York as well as in the rest of the country.

The Court of Appeals next adverts to the statutes (R. 200). The discussion is confused. The Court says that if appellants were not authorized or licensed in New York and transacted no business in that state, the statutes would not be applicable, but since appellants are licensed, the sections (except Section 130 which it discusses separately) are applicable, the Court thereby ignoring the fundamental rule that a license cannot furnish a basis for the imposition of unconstitutional regulations. Section 130, which on its face applies only to the foreign insurer who "shall in this state issue, deliver or otherwise effectuate any contract of insurance," is by a piece of judicial amendment held to apply to appellants' contracts because "as indicated above, they (appellants) are doing business here."

The holding of the Court of Appeals that these Subscribers are doing business in New York in effect compels appellants to retain their New York licenses. Thus all of the challenged statutes become applicable to them. Therefore the Court's statement that the statutes apply only to authorized reciprocals is misleading. As the decision now stands, the only escape from regulation open to the New York Subscribers is for them to give up their insurance.

Why should these business men be compelled to give up carrying their own insurance and thereby add up to fifty per cent to their insurance costs simply because the State of New York has seen fit to impose a set of untried regulations upon them? Doubtless old line companies would like to see these cooperatives broken up so that appellants would be obliged to go into the open market and purchase insurance of them. It seems strange that the Court of Appeals would invoke a technicality to reverse the well-reasoned opinion of the Appellate Division

in order to prevent this reasonable cooperation among business men to lighten the charge upon business, where there is no public to be protected and no one is asking to be protected against the use of his own credit and business standing and the saving it gives to him. This is particularly true during the present period when many small business men are struggling for existence. We assert that cooperation among business men based upon mutual confidence and trust ought to be encouraged instead of discouraged or prevented altogether.

Authorities cited by Trial Term on issue of jurisdiction.

In making a case for jurisdiction in New York State the Trial Term cited two tax cases, referred to below, and *Osborn* v. *Ozlin*, 310 U. S. 53. Not one of these cases was mentioned by either the Appellate Division or the Court of Appeals. In citing the tax cases the Trial Term overlooked the principle that although taxation in a sense is regulation, the right to tax does not carry with it the right to regulate. The power to regulate includes the power to restrain or prohibit altogether, whereas in the case of taxation, the non-resident insurer escapes the prohibition by paying the tax. This distinction is recognized by Mr. Justice Holmes in the first of these cases, *Equitable Life Ass'n. Soc.* v. *Penn*, 238 U. S. 143, 147, where he said:

> "The fact that the state could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefits thus annually extended into Pennsylvania in measuring the value of privileges that it does grant."

And the same judge in his dissenting opinion in the second case, *Compania de Tabacos* v. *Collector*, 275 U. S. 87, 100, said:

> "It readily may be seen that a state may tax things that under the Constitution as interpreted it cannot prevent."

It is irrelevant that under these cases a state may tax a licensed foreign insurer and measure the tax by contracts entered into outside of the state, where either the insured, or the property, or both, are in the state, and the contracts are to be performed within the state. But if this were a tax case the authorities cited would still be inapposite because here there is no performance in New York. In taxation cases the license is of course important because the tax is the price charged for it.

In *Osborn* v. *Ozlin*, 310 U. S. 53, the case principally relied upon by the Trial Term for its adverse conclusion regarding jurisdiction, suit was brought by thirty-four non-resident casualty companies who maintained an elaborate agency system in the State of Virginia. Paragraph (7) (a) of the complaint filed in the District Court alleged in effect the doing of business for the purpose of regulation by averring the making of contracts within the State of Virginia, the language being that "*Each agent* plaintiff • • • *has countersigned* for his respective company or companies *large numbers of contracts* covering in Virginia some of which were produced outside of Virginia and some in Virginia. • • • *Due to the frequency of said countersignatures* the aggregate value of the services of each agent plaintiff has been very great, though the value of furnishing a single countersignature was trivial." This doing of business was also reflected in the finding of the District Court (29 F. Supp. 71) that, "Customarily, contracts produced outside of Virginia have been countersigned by the general agents and branch office managers without compensation." It goes without saying that countersigning and delivering the policies within the state, being the last effective acts to give the contracts validity, made them Virginia contracts.

The District Court also found other facts that independently of the foregoing constituted the doing of business in Virginia, including the finding that "The companies em-

ploy field supervisors to stimulate and guide the activities of local producers, *to accept or reject orders for contracts* from producers, *to underwrite, prepare and check contracts, to collect premiums* and *generally to represent the company* in a particular territory. The two major classes of field supervisors are: (a) The general agent . . . *In Virginia, the general agents produce the bulk of the local business.* (b) The branch office manager or salaried company representative who has the same powers and duties as the general agent, but is compensated by a salary and receives no commission for producing business. *Whenever a branch manager negotiates a policy directly with an assured,* the rule of the National Association of Insurance Agents, in which most insurers have acquiesced, *requires that the contract be closed through one of the manager's commission agents* who is paid the full producer's commission. The manager's function is to *develop his territory through ordinary producing agents* and to supervise and *assist them in the production of desirable business*" (italics supplied),—all in Virginia. This Court approved the above findings of fact in their entirety.

In addition to all this, the contracts, under the stock company agency system used by these companies, were performable within the state. An elaborate system of "servicing" was maintained by these companies; casualty suits were defended within the state and losses were adjusted and paid therein by the stock company adjusters. Other activities within the state were directed toward enforcing compliance at all times by the companies and assureds with the "network of legislation (which) controls the surety and casualty business in Virginia" (310 U. S. 63). Virtually everything pertaining to the business of casualty insurance in this myriad of ramifications was done within the state, and this Court assumed the doing of business within Virginia which the plaintiffs did not dispute. The examples of proper cases for state supervision given

in the opinion all presuppose the existence of jurisdiction to regulate (310 U. S. 65, 66).

There was no claim in the *Osborn* case that the statute requiring the countersigning of policies within the state was invalid. Plaintiffs had been doing this enormous mass of business within Virginia over a period of years and had submitted to the jurisdiction of the state to regulate its contracts, and the requirement that the policies be countersigned within the state was part of the system of regulation plaintiffs had submitted to. There was no attempt by Virginia to secure jurisdiction over the policies through the requirement of countersignature, and the complaint, in which three countersigning resident agents joined, alleged compliance therewith. The sole grievance was that that part of the Virginia statute was unconstitutional which forbade a salaried representative countersigning policies of insurance, but required the countersigning resident agent to collect all premiums paid thereunder and keep not less than fifty per cent of the commissions paid by the company for procuring the business.

The contention was made that because of the large commissions provided for the countersigning resident agent by the challenged statute, insurance costs outside the state would be increased and hence Virginia in effect would be regulating matters beyond her jurisdiction, but this Court disposed of this argument by saying that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids" (310 U. S. 62). Because of all this business done within the state "Virginia has taken hold of a matter within her power" (310 U. S. 62).

That the State of Virginia recognizes the inapplicability of the countersignature statutes to reciprocal insurance is shown by Sections 4235-c and 4340-a of the Virginia

Code, which specifically except reciprocal insurance from the operation of the statutes providing for countersignature.

Point II.

Equal Protection of the Laws.

The following sections are invalid and inapplicable because they deny to appellants the equal protection of the laws.

Section 412, Subsection 1.
Section 417, Subsection 1.
Section 418, Subsection 1.

Section 412, subsection 1 (Appendix A), prohibits the Subscribers from making "any new agreement for insurance" who do not have net assets in an amount not less than ten thousand dollars. The statute also provides that "before renewing a contract of insurance with a Subscriber" similar proof of financial responsibility shall be required unless the Subscriber has accumulated the operating reserve required by Section 418, subsection 1, hereinafter discussed, that is, twice the amount of the "annual premium" (the term being improperly applied to the initial deposit) or the Subscriber's pro rata share, determined on the basis of "annual premiums in force" of one-half of one per cent of the aggregate insurance in force.

Thus a canner or wholesale grocer who does not have net assets in excess of ten thousand dollars is forbidden to insure any new stock of goods, new equipment, new building or addition, or the like, although he would be permitted to renew a contract on subject matter covered by a previous contract if he had the operating reserves required by Section 418, subsection 1. Although the great majority of contracts entered into are on new subject matter (stocks of canned goods and groceries), neither group builds up reserves which meet the requirements of

Section 418, subsection 1, so as to allow them the privilege of renewing their outstanding contracts (R. 63, 64). Thus all Subscribers not worth the sum of ten thousand dollars or over are prohibited from carrying their own insurance. Such Subscribers constitute a "great number" of the entire membership in both groups (R. 79). The undisputed evidence is that Section 412, subsection 1, is simply an arbitrary provision that denies to the small business man the right to carry his own insurance, and that over thirty years' experience has proven that no necessity exists for such a provision (R. 79). The Trial Term found (R. 176) the said section invalid on the ground that it denies to the small business man the right to secure this insurance. The Court of Appeals in reversing did not even deem the rights of the Subscribers in this regard worth mentioning.

Truly this is legislation based on a "man's mere property status," which, "without more, cannot be used by a state to test, qualify, or limit" the rights of citizens. (*Edwards* v. *California*, 314 U. S. 160, 184.) There is no relation whatever between the requirement of this statute and the ability of a Subscriber to pay a liability arising out of his insurance contract. Thus a Subscriber having net assets of $12,000 would be permitted unlimited insurance and could incur a liability far in excess of his worth, while a Subscriber worth only $8,000 would be barred from carrying any insurance, or assuming a liability therefor of even one dollar. Other instances showing the glaring discrimination of this section could also be given.

It seems clear that this statute denies to appellants the equal protection of the laws.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.

Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32, 37.

Cotting v. *Godard*, 183 U. S. 79, 109, 111, 112.

Engel v. *O'Malley*, 219 U. S. 128, 138.

Another objection to Section 412, subsection 1, is that no similar requirement is made for members of mutual fire insurance companies or persons desiring to insure their property in any insurance company.

Section 418, subsection 1 (Appendix A) referred to above, requires each Subscriber to build up an operating reserve by deducting each year not less than one-quarter of his "earnings as an underwriter" until he has accumulated the greater of these two sums: (a) Twice the amount of his premium, or (b) his pro rata share of an aggregate reserve of one-half of one per cent of the aggregate amount of insurance in force. But there is no premium in this co-operative insurance, nor has the provision for "earnings as an underwriter" any application to appellants for the obvious reason that they have no such earnings. Instead, the unused portion of the deposit to which the Subscriber has retained title throughout is returned to him each year.

Section 418, subsection 1, if applied to appellants would require the building up of unnecessarily large reserves. For over thirty years the present system of accumulating and maintaining reserves has proven adequate to meet all losses, expenses and contingencies. The reserve requirements of this section are new. No other state requires them. There are no comparable requirements for insurance companies (R. 81, 82). In holding the statute to be discriminatory, the Trial Term stated that if New York imposed similar requirements on stock companies it would put a great many of them out of business (R. 177). Moreover, the statute creates a joint liability as to these reserves—anathema to appellants' plan.

Section 417, subsection 1 (Appendix A), purports to require appellants to amend their contracts and Powers of Attorney so that they "shall provide for a contingent several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an

amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the Subscriber by the reciprocal insurer." But Section 345, subsection 1 (Appendix B), of the Insurance Law relating to mutual fire insurance companies provides no limitation whatever to the contingent liability of members of a mutual company.

To impose Section 417, subsection 1, upon appellants would require them to remake their system. Here the liability of a Subscriber is one entire liability, definite and certain. The Subscriber must pay his several, separate, fractional share of all losses and expenses at all events, and limitation upon this liability would be inconsistent with the theory of the system. In contrast the term "contingent liability" implies two liabilities,—a fixed liability to the extent of the deposit and an additional liability, contingent on the happening of some event not specified. The term obviously has no application to this self-insurance. The use of the word "assessment" in the statute as applied to the case at bar is also without meaning.

Nor could liability be limited, as proposed by Section 417, subsection 1, without destroying the present plan (R. 81). This is the uncontroverted evidence. The statute would hybridize appellants' insurance with old line insurance. There is no premium or other amount of any designation "expressed in such contracts,"—can be none. In the very nature of things the cost cannot be determined until the end of the period of coverage. Appellants' initial deposit is made for convenience only.

The reserve requirements of Section 418, subsection 1, as compared with the reserve requirements for insurance companies, is a denial to appellants of the equal protection of the laws. Likewise the requirements of Section 412, subsection 1, and Section 417, subsection 1, as compared

with members of mutual fire insurance, is a denial to appellants of equal protection of the laws.

Concordia Fire Insurance Co. v. *Illinois*, 292 U. S. 535, 545, 549.

Hartford Steam Boiler Ins. Co. v. *Harrison*, 301 U. S. 459, 461.

Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 272, 274.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.

Louisville Gas and E. Co. v. *Coleman*, 277 U. S. 32, 37.

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 86.

Point III.

Unreasonable Regulation.

The statutes are invalid and inapplicable on the ground of unreasonable regulation.

In addition to violating the equal protection of the laws clause, each of the above three statutes is invalid and inapplicable as unreasonable and discriminatory regulations and prohibitions. The other statutes will now be considered in relation to the due process clause on the ground of unreasonable regulation. The following authorities illustrate the general principles applicable.

Nebbia v. *New York*, 291 U. S. 502, 525.

McLean v. *Arkansas*, 211 U. S. 539, 548.

C. B. & Q. R. Co. v. *McGuire*, 219 U. S. 549, 589.

Truax v. *Corrigan*, 257 U. S. 312, 332, 333.

Section 130.

Section 422, Subsection 1.

We contend that the construction given Section 130 (Appendix A) by the Court of Appeals does violence to the plain meaning of words because it emasculates the section of the condition precedent to its application, to-wit, that the foreign insurer "shall in this state issue, deliver or otherwise effectuate any contract of insurance," and substitutes therefor "doing business here," as defined by the Court of Appeals. The effect of this construction being to confirm the jurisdiction of the State of New York over appellants' contracts, we maintain that Section 130, as now construed, is invalid as an extraterritorial usurpation forbidden by the due process clause.

In general all risks fall into two classes: (a) The factories and warehouses of canners and the stores and warehouses of wholesale grocers; (b) Stocks of canned goods and groceries. The contracts in relation to the first class of risks are simply renewed from time to time. In the second class, new contracts are issued on inventories as they accumulate. The "turn-over" of these inventories is frequent. When a Subscriber receives a new stock he simply telephones, wires or writes the office in Chicago to cover the goods. There is never any difficulty. The parties do not deal at arm's length; on the contrary, a relation of mutual trust and confidence exists. Therefore transactions are frequently informal. If a mistake should be made it is easily corrected. There is nothing in the relation of appellants to require the superintendence of an outsider—at twenty-five per cent additional cost to the Subscriber.

Moreover, these being highly specialized risks, only a professional insurance engineer is qualified to "service" them. Ordinarily the resident agent would not be so

qualified (R. 76, 77). And the risks being limited to one or two in a particular vicinity in order to eliminate the conflagration hazard, it would be impracticable for the so-called resident agent to visit them. This the evidence shows (R. 75, 76, 77).

Section 130 should be read with Section 422, subsection 1 (Appendix A), which requires the maintenance of at least one office in the State of New York. Section 110, subsection 3 (Appendix B), requires the agent to be a soliciting agent compensated on a commission basis. We believe that one of the reasons for demanding that appellants cause their contracts to be countersigned by a resident agent is to secure commissions to the local agents. Manifestly the agency system has no place in this self-insurance; it would arbitrarily add approximately twenty-five per cent (R. 75) to the cost.[1] It is not denied in the record that the enforcing of Sections 130 and 422, subsection 1, against appellants, would result in the ultimate destruction of the system (R. 77, 83). We assert that the statutes are harsh, arbitrary, and unreasonable regulations.

Section 168, Subsection 2.

This statute (Appendix A) provides that "no policy or contract of fire insurance * * * shall be made, issued or delivered * * * on any property in this state, unless it shall conform in all particulars" to the standard fire insurance policy of the State of New York. The present section was repealed after the commencement of this litigation, and a new statute enacted, to take effect July 1, 1943 (Ch. 900, Laws of 1942). The new statute carries forward the same general objection as the present statute.

The question is whether appellants are to be permitted to make such changes in the New York standard policy as are necessary under their system of inter-insurance. Obvi-

1. See *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 255 *et seq.*

ously the statutory form of policy was prepared for insurance corporations, and the adaptation thereof to appellants' use has required many changes. Thus at the top of the first page of the contract (Exhibits 7, 9; R. 59, 228, 235) is substituted a paragraph containing a full description of the individuals, partnerships, and corporations who exchange the contracts. Next, the contract as adapted incorporates the Power of Attorney. Because a premium or price for this insurance cannot be stated, the usual language relating to premium has been eliminated, and the consideration stated is the exchange of insurance by the Subscribers. This is of the very essence of the insurance, and the requirement that a premium be stated is carried forward in the new statute. Toward the bottom of the same page of the policy is substituted another full paragraph setting forth the several nature of the Subscribers' liability and the manner in which it is determined. The contracts required to be used therefore cannot be made to "conform in all particulars" to the form prescribed without completely destroying the plan of insurance. The Trial Term (R. 176) permitted sufficient latitude to make the statute workable. We contend that the statute is void because unreasonable, arbitrary, and capricious, as well as because of lack of jurisdiction.

Section 410, Subsection 1.

Section 415, Subsection 1(d).

The first of these statutes (Appendix A) has to do with the "advisory committee" which, subject to the Articles of Association and Subscribers Agreement has ultimate powers of management. The Trial Term held that since appellants' Power of Attorney is in negation of such power the provision is rendered meaningless (R. 176). The Court of Appeals did not dissent from this construction. Section 415, subsection 1(d) (Appendix A) provides for a method

of electing advisors not unlike the one used by the canners group but differing from the one used by the wholesale grocers. As to the latter group the statute is one more unnecessary regulation (R. 80).

Section 415, Subsection 1.

The statute (Appendix A) requires all Subscribers to execute and acknowledge the Power of Attorney "in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such Subscriber is domiciled." The statute is of nation-wide application and it is difficult to instance a clearer case of extraterritorial legislation. New Subscribers cannot be accepted by any such loose method as would ever admit of a forgery or mistake in identity. It is a cumbersome and burdensome regulation, being unreasonable, arbitrary, and capricious (R. 80).

Section 413, Subsection 2.
Section 418, Subsection 3.
Section 420.

Section 413, subsection 2 (Appendix A), requires the accumulation of a special contingent surplus, or guaranty surplus, at the rate of one per cent of the insurers' net premium income for each such year until a minimum surplus of at least 250 thousand dollars is built up (Sections 411, subsection 4, and Section 341, subsection 1(a) (Appendix B)). The statute also provides that the fund thus accumulated shall not be impaired except upon liquidation.

Not that appellants do not have reserves in excess of the requirement of Section 413, subsection 2. The 1939 statement of Warner Reciprocal Insurers (Exhibit 11; R. 65, 247) shows reserve funds in excess of 400 thousand dollars, exclusive of unreturned savings of 228 thousand dollars, while the corresponding statement for Canners

Exchange Subscribers (Exhibit 12; R. 65, 255) shows reserve funds in excess of 2 million dollars, exclusive of 850 thousand dollars of unreturned savings; and the reports of the convention examinations of the National Convention of Insurance Commissioners made in 1937 (Exhibits 18, 19; R. 72, 284, 300) show the accumulated reserves substantially in excess of the minimum requirement of Section 413, subsection 2, but these reserves are of a totally different kind from those purported to be required by said Section 413, subsection 2. The reports of examination commend the "excellent" cash position of both groups (*Id.*).

Our reasons for challenging Section 413, subsection 2, are as follows: It is a fundamental principle of this self-insurance that each Subscriber retain title to all deposits and other funds, and that no one Subscriber's funds be used to pay the liability of another Subscriber, that is to say, that no joint liability be imposed, and that upon withdrawing from the plan a Subscriber shall get his money back. The statute, however, seeks to interpolate into the Power of Attorney provisions wholly subversive of this principle of several, separate ownership of the funds. Thus the statute provides that the surplus may not be "impaired" by "dividend distributions" to the Subscriber or by refunds or returns of continuing or retiring Subscribers' reserves or deposits except in the event of liquidation, and for the building up of reserves "at the rate of one per cent of its net premium income." The Trial Term held that a premium is alien to this insurance, "and the plaintiffs may not be compelled to introduce (into the policy) such false provision." (R. 175, 176.) Nor is there any measure by which these reserves are to be built up. The statute also refers to "dividends" to Subscribers, with the provision against "impairment" by "dividend distributions," which plainly is not applicable except by a loose analogy to the return of the unused portion of the deposit as a saving.

The worst feature of the statute is that it would eliminate the separate individual ownership of the funds making up the aggregate surplus and substitute therefor a joint fund. Thus title to the reserves would pass out of the Subscriber. Upon the Subscriber's withdrawal, the money would not be returned to him. In over thirty years of experience the Subscribers have never been obliged to fall back upon the reserves to pay a single loss or other obligation (f. 285), and any reserves built up under Section 413, subsection 2, would probably constitute a permanent fund. Only insolvency or liquidation would rescue the fund from permanent alienation; even then it would not be returned to the Subscriber.

The above considerations also apply to Section 418, subsection 3 (Appendix A), held invalid by the Trial Term (R. 177), and to Section 420.

In challenging these statutes appellants believe that they present no mere question of legislative policy, but a question of statutes actually prohibiting the continued existence of the system (R. 79, 80). To save this self-insurance is the reason the instant litigation was commenced. Moreover, appellees admit that no necessity exists for making the fundamental changes required by these sections. We contend that Sections 413, subsection 2, 418, subsection 3, and 420 are invalid on the ground of unreasonable regulation, as well as on the ground of lack of jurisdiction.

Section 421.

This statute (Appendix A) deals with accounting procedure. In so far as it requires the Attorney-in-Fact to maintain a separate account for each Subscriber, it corresponds with appellants' plan and no objection is made. But in attempting to apply such terms as "premiums earned by him as an underwriter" and "operating reserves", both of which are alien to appellants' inter-insurance, this section must fall with Section 418, subsection 1,

as unreasonable regulation, as well as for lack of jurisdiction (R. 82, 83).

Point IV.

Conclusion.

It has been said that the present tendency of the decisions of this Court is to allow the states a wider latitude than heretofore in legislation concerning purely local matters. We believe the necessary corollary to this view is that state legislation should be examined with increased scrutiny to make certain that, in the exercise of these broader powers, the state has not been guilty of exceeding the bounds of its jurisdiction or of denying rights guaranteed by the equal protection of the laws clause.

The practical effect of the New York statutes under consideration is to deny to all citizens of the United States in the State of New York the right to carry their own insurance. For if appellants were forced to comply with the New York statutes their cooperative insurance plan would cease to be, and some entity type of insurer, the precise nature of which is not certain, would be substituted. If it be required that the insurance contract state a premium or price charged for the insurance, if joint liability be substituted for the present several liability, if the individual ownership of the funds be eliminated, if the agency system be forced on these groups—then appellants' system of inter-insurance as it is known today will have passed out of existence, and one of the finest examples of cooperation among American business men will have become but a memory.

We pray that the judgment of the Court of Appeals of the State of New York be in all things reversed.

Respectfully submitted,

Franklin D. Trueblood,
Craig R. Johnson,
Counsel for Appellants.

Carl O. Olson,
Of Counsel.

APPENDIX A.

Statutes Sued Upon.

(Showing in italics particular provisions alleged.)

Insurance Law of 1939 of the State of New York:

SECTION 40, SUBSECTION 4. (Objectionable portion repealed during pendency of this litigation.)

SECTION 130, SUBSECTION 1. "Except as provided in subsection two, *no licensed foreign or alien insurer shall in this state issue, deliver or otherwise effectuate any contract of insurance covering* either persons resident in this state or *property situated in this state,* or covering any risk incident to the performance or non-performance of any contract or obligation to be performed in this state, or covering any risk incident to any obligation or duty which is governed by the laws of this state though actually to be performed elsewhere, *unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state.* Within the meaning of this section, a licensed individual insurance agent shall be deemed to be resident in this state if he has his domicile or his principal place of business in this state, and a licensed corporation insurance agent shall be deemed to be resident in this state if it maintains a lawfully established place of business in this state; and a licensed firm or association insurance agent shall be deemed to be resident in this state if it maintains an established place of business in this state."

SECTION 168, SUBSECTION 2. "*No policy or contract of fire insurance, including a renewal of such policy or contract, shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform in all particulars* as to

size of type, as to location of blank spaces, and as to all provisions, agreements and conditions, with such printed blank form of policy (the standard form of the National Convention of Insurance Commissioners; section 168, subsection 1); and no other or different provision, agreement or condition shall be in any manner made a part of such contract or policy, except as follows:" (Repealed as of July 1, 1943.)

SECTION 410, SUBSECTION 1. "Within the meaning of this chapter the term 'reciprocal insurer' shall mean any aggregation of persons, firms or corporations, herein called 'subscribers,' who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term 'reciprocal insurer' shall include any reciprocal or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. *The term 'advisory committee' as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer, and which has, subject to the articles of association and subscribers' agreement, ultimate power and responsibility in the management and control of the affairs of a reciprocal insurer.*"

SECTION 412, SUBSECTION 1. "*No authorized reciprocal insurer shall make any new agreement for insurance with any person, firm or private corporation who or which does not have assets in his, their or its own right in an amount*

not less than ten thousand dollars in excess of liabilities, as shown by a commercial agency report, as hereinafter provided, or by a sworn statement on file with the attorney-in-fact, verified by such subscriber or by an officer of a corporation subscriber.

Before renewing a contract of insurance with a subscriber, similar proof of financial responsibility shall be required unless the subscriber has accumulated and maintains the subscriber's operating reserve required by section four hundred eighteen. The report of an established commercial agency having one hundred thousand or more subscribers shall be deemed presumptive evidence of the financial condition of a subscriber."

SECTION 413, SUBSECTION 2. "*Every authorized reciprocal insurer,* at the end of the first and every succeeding calendar year following the effective date of this chapter, and in the case of a reciprocal insurer hereafter authorized, at the end of each full calendar year of doing business in this state, *shall accumulate and maintain a special contingent surplus, or guaranty surplus,* by whatever name called, *at the rate of one per cent of its net premium income for each such year* as reported in its annual statement, *until such contingent surplus shall be at least equal to the amount of minimum surplus required in section four hundred eleven* (two hundred fifty thousand dollars). *Such contingent surplus shall not be impaired by dividend distributions or by refunds or returns of continuing or retiring subscribers' reserves or deposits except in the event of the liquidation of such reciprocal insurer under order of a court.* Any such reciprocal insurer may set aside the entire amount of the contingent surplus herein required or accumulate such surplus at a rate in excess of that herein required; but such contingent surplus, once set aside, shall be thereafter maintained unimpaired except as to the amount, if any, in excess of the minimum surplus required by section four hundred eleven."

SECTION 415, SUBSECTION 1. *"Every subscriber of an authorized reciprocal insurer shall have executed a subscriber's agreement, and every subscriber hereafter executing such a subscriber's agreement shall execute and duly acknowledge the same, in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such subscribers is domiciled,* and every subscriber's agreement shall be identical in terms, except as to the date and the name and address of the subscriber, with all other subscriber's agreements currently in force and effect with all other subscribers of such reciprocal insurer. Every such subscriber's agreement shall contain in substance the following provisions:

• • • • •

(d) "A provision *that there shall be an annual meeting of the subscribers,* in person or by proxy, at a time and place to be determined in accordance with such agreement, of which each subscriber shall be duly notified and *at which each subscriber shall have power to vote in person or by proxy for all members of the advisory committee to be chosen or appointed at such time."*

(e) *"A provision specifying the powers and duties of the advisory committee,* which shall include the power and duty to regulate the compensation, powers and duties of the attorney-in-fact, if not specifically provided in the subscriber's agreement, and *shall also include the power to make regulations for the effective control and custody of the funds and investments of the reciprocal insurer."*

(Applicable only to Warner Reciprocal Insurers.)

SECTION 417, SUBSECTION 1. *"Every contract of insurance and every power of attorney of the attorney-in-fact or subscriber's agreement under or by which contracts of insurance are issued or exchanged by any authorized reciprocal insurer shall provide for a contingent several liability for assessment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount*

not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer."

SECTION 418, SUBSECTION 1. *"Every subscriber of an authorized reciprocal insurer shall be required to accumulate a minimum operating reserve,* to be credited to such subscriber on the books and records of such reciprocal insurer, *by authorizing the attorney-in-fact to credit* to such account at the end of the fiscal year of such reciprocal insurer, *an amount not less than one quarter of such subscriber's earnings as an underwriter* during such period. Such accumulation shall be made if and at least *so long as such subscriber's operating reserve is less than the larger of the following amounts: (a) Twice the amount of the annual premium or premiums in force as of such date on all policies issued to such subscriber by the reciprocal insurer; or (b) such subscriber's pro rata share, determined on the basis of annual premiums in force, of an aggregate operating reserve for such reciprocal insurer equal to one-half of one per cent of the aggregate amount of fire insurance in force* in such reciprocal insurer as of such date."

SECTION 418, SUBSECTION 3. *"No subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of such operating reserve, but all assets held by such insurer shall be available for the payment of claims of policyholders and creditors of such reciprocal insurer in preference to any claim for withdrawal* by a subscriber as such. Any subscriber's operating reserve accumulated by any such reciprocal insurer shall be maintained at all times, except that a subscriber may, upon withdrawal from membership and cancellation of all insurance contracts held by him in such insurer, and after giving to the attorney-in-fact written notice of withdrawal at least sixty days in advance, withdraw the amount of his operating reserve less such surrender charges as

may be deducted pursuant to the subscriber's agreement. No such withdrawal shall be permitted after an order of liquidation of, or the appointment of a receiver or liquidating trustee for, any such reciprocal insurer."

SECTION 420. "*All of the assets of any reciprocal insurer including subscribers' operating reserves shall be liable primarily for payment of all liabilities incurred under its policies or other contracts. No part of the surplus funds of such reciprocal insurer shall be subject to the claims of general creditors of any of the individual subscribers of such insurer until all policies under which any such subscriber is obligated have been terminated and in no event beyond the amount of such subscriber's operating reserve.* The contingent liability of subscribers for additional premiums or assessments shall not be included as an asset in the financial statement of a reciprocal insurer. Subscribers' operating reserves for which notice of withdrawal has been given shall be reported as liabilities until paid. *In any statement or report of the financial condition of a reciprocal insurer filed in this state, the surplus to policyholders, after providing for the unearned premium reserves, loss reserves and other liabilities, as required by this chapter, shall be reported as follows: 1. Special contingent surplus; 2. Subscribers' operating reserves; 3. All other surplus, if any.*"

SECTION 421. "The attorney-in-fact, in addition to the books of account of the collective transactions of all subscribers of the reciprocal insurer, shall keep and maintain a separate account for each individual subscriber setting forth the entries determining the operating reserve, if any, of such subscriber. *Each subscriber's account shall be credited with the premiums earned by him as an underwriter on the policies issued by the exchange, and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer.* Earnings and interest income from investments of

all subscribers' operating reserves shall be apportioned and credited to subscribers on the basis of their accumulated operating reserves and all other interest and investment income may be apportioned and credited to the subscribers on the basis of their premiums earned as underwriters."

SECTION 422, SUBSECTION 1. "The superintendent may, in his discretion, pursuant to section forty-two, issue a license to a reciprocal insurer domiciled in, or organized under the laws of another state or of any province of the Dominion of Canada, to do in this state such kind or kinds of insurance business as a domestic reciprocal insurer may be authorized to do in this state. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business and in addition every such alien reciprocal shall be subject to the provisions of this chapter relating to alien insurance companies authorized to do the same kind or kinds of insurance business. Nothing herein contained shall be deemed to require that the attorney-in-fact of a foreign or alien reciprocal insurer shall be resident or domiciled in this state, or shall maintain his or its principal office in this state, or shall be organized under the laws of this state; but *every authorized reciprocal insurer shall maintain at least one office in this state.*"

APPENDIX B.

Statutes Indirectly Involved.

Amendment of 1936 to the Insurance Law of the State of New York:

The Consolidated Laws of New York Annotated, Book 27, Insurance Law. SECTION 69, SUBSECTION a. *Issuance through resident agents of insurance risks by certain foreign insurance companies.* "No insurance company or insurer organized or existing under the laws of any other state or country shall issue or deliver any policy or make any contract of insurance on either persons or property in this state, or covering any hazard or risk in the performance or non-performance of any duty relative to any contract or obligation, performed or to be performed in this state, or in connection with any obligation or duty which is governed or controlled by the laws of this state, but actually to be performed by any individual, firm or corporation not resident in this state, unless such policy or contract is issued through or countersigned by a lawfully constituted and licensed resident agent of this state, provided nothing in this section shall be construed to apply to contracts or policies of life insurance, or to certificates of fraternal benefit societies, or to insurance covering the rolling stock of any railroad or any vessel, airplane, or motor bus used in interstate commerce, or to property in transit, or to reinsurance between companies.

Insurance Law of 1939 of the State of New York:

SECTION 41, SUBSECTION 3. The term "doing an insurance business," within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or proposing to make as insurer, of any insurance contract, and (b) the making, as guarantor or surety, or the proposing to make

as guarantor or surety, of any contract of guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the guarantor or surety, and (c) the doing of any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter and (d) the doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter.

SECTION 42. *Requirements for foreign or alien insurer's license.* 1. Before issuing a license to do business, except by way of a renewal license, to any foreign or alien insurer the superintendent shall require it to submit for filing a certified copy of its charter, and of its by-laws, if any, currently in force, and such other documents as may be necessary to show the kind or kinds of business which it is empowered or authorized to do, and also a full statement verified by two officers or responsible representatives in such manner as the superintendent shall prescribe, showing its assets, liabilities and financial condition. The superintendent may also require a full statement of its income and disbursements, business done, and other facts required to be shown in the annual statement of such an insurer. Before issuing any such license the superintendent may make an examination of the affairs of such insurer at its principal office within the United States, or he may accept in lieu thereof a report of an examination made by the insurance department or other insurance supervisory official of any other state or of any government outside the United States. Before issuing any new or renewal license to any foreign or alien insurer hereafter applying for the same, the superintendent may require satisfactory proof, either in the charter of such insurer or by an agreement evidenced by a duly certified resolution of its board of directors, or otherwise as the super-

intendent may require, that such insurer will not engage in any insurance business in contravention of the provisions of this section, nor any insurance business which it is not empowered or authorized to do by its charter.

2. The superintendent shall issue a renewal license to any foreign or alien insurer if he shall be satisfied, by such proof as he may require, that such an insurer is not delinquent with respect to any requirement imposed by this chapter and that its continuance in business in this state will not be hazardous or prejudicial to the best interests of the people of this state.

3. No foreign insurer shall be licensed to do in this state any kind of insurance business, or combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No foreign insurer shall be authorized to do business in this state if it does in this state or elsewhere any kind of business, other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is licensed to do in this state.

4. No alien insurer shall be licensed to do in this state any kind of insurance business, or any combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No alien insurer shall be authorized to do an insurance business in this state if it does anywhere within the United States any kind of business other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state.

5. Except as otherwise specifically provided in this chapter no foreign insurer and no United States branch of an alien insurer shall be or continue to be authorized to

do an insurance business in this state if it fails to comply substantially with any requirement or limitation of this chapter, applicable to similar domestic insurers hereafter to be organized, which in the judgment of the superintendent is reasonably necessary to protect the interests of the people of this state.

No foreign insurer and no United States branch of an alien insurer which does outside of this state any kind or combination of kinds of insurance business not permitted to be done in this state by similar domestic insurers hereafter organized, shall be or continue to be authorized to do an insurance business in this state, unless in the judgment of the superintendent the doing of such kind or combination of kinds of insurance business will not be prejudicial to the best interests of the people of this state.

This subsection shall not be deemed to affect the requirements of section forty or of subsections one and two of section one hundred ninety-three.

6. Notwithstanding the provisions of subsection three, any foreign insurance company which has been licensed to do the business of life insurance in this state continuously during a period of twenty years next preceding the effective date of this chapter may continue to be licensed, in the discretion of the superintendent, to do the kind or kinds of insurance business which it was authorized to do immediately prior to the taking effect of this chapter.

Section 90. *Investments of foreign and alien insurers.* 1. The superintendent may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this chapter upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The superintendent may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the

securities specified in paragraphs (b) and (d) of section seventy-nine.

2. No alien insurer shall be authorized to do business in this state unless its general state deposits and its trusteed assets comply in substance with the requirements and limitations of this chapter applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under section eighty-one in an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which are not in default as to principal or interest may be included in the trusteed assets of such alien insurer in an amount not exceeding ten per cent of the total admitted assets of the United States branch of such insurer.

SECTION 110, SUBSECTION 3. The term "insurance agent" as used in this article, means any authorized or acknowledged agent of an insurer or fraternal benefit society, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or procurement or making of, an insurance or annuity contract, other than as a licensed insurance broker; except that the term "insurance agent" shall not include any regular salaried officer or employee of a licensed insurer or fraternal benefit society or of a licensed insurance agent, who does not outside of an office of such insurer or agent

solicit or accept from the public applications or orders for any such contract, if such officer or employee does not receive for his services a commission or other compensation directly dependent upon the amount of business done.

SECTION 168, SUBSECTION 1. *Fire insurance contract; standard policy provisions; permissible variations; temporary contracts; combination policies; "mutual" and "stock" required.* 1. The printed form of a policy of fire insurance, adopted on the twelfth day of December, nineteen hundred sixteen by the National Convention of Insurance Commissioners (now known as the National Association of Insurance Commissioners) at its meeting in the city of New York and heretofore filed by the superintendent in his office pursuant to section three of chapter four hundred forty of the laws of nineteen hundred seventeen, together with such additions, omissions and modifications, similarly adopted from time to time by said association, as may be approved by the superintendent, shall be known and designated as the "standard fire insurance policy of the state of New York." Upon the payment of a fee of ten cents the superintendent shall furnish a true copy of such form to any person requesting the same.

SECTION 341, SUBSECTION 1(a). *Stock fire and marine insurance companies; organization; powers and financial requirements.* 1. A stock company may be organized in the manner prescribed in section forty-eight and be licensed to do an insurance business of the following kind or kinds, as specified in section forty-six, with the following requirements as to minimum paid-in capital, and with an additional requirement of paid-in initial surplus in each instance at least equal to the amount of its paid-in capital, and every such company shall at all times thereafter maintain a minimum capital at least equal to that hereinafter specified:

(a) If organized to do the business of fire insurance, as specified in paragraph four of section forty-

six, it shall have a capital at least equal to two hundred fifty thousand dollars, and it may in addition do any one or more of the kinds of business specified in paragraphs five, six, twelve, nineteen and twenty (excluding insurance in respect to, appertaining to or in connection with, any and all risks or perils of navigation, transit, or transportation, including war risks, on, over or under any seas, and excluding insurance against loss or damage and against liability for loss or damage, by reason of injury to the person) without having additional capital or surplus.

SECTION 345, SUBSECTION 1. *Mutual fire insurance companies; contingent liability; assessments; extraordinary reserve.* 1. Except as provided in section fifty-eight, every domestic mutual fire insurance company shall in its by-laws and policies prescribe the contingent mutual liability of its members for the payment of assessments, in such a way that each member shall be liable to pay his proportionate share, subject to the limitations hereinafter specified, of the amount of any assessment or assessments necessary to make good an impairment of the minimum surplus of such company. The contingent liability of a member may be limited to an amount not less than one additional annual premium on each policy held by him. No such insurance company shall make, issue or deliver any policy of insurance, except as provided in section fifty-eight, which does not prescribe the contingent liability of the policyholder in clear and explicit language printed in type not smaller than eight point.

SECTION 410, SUBSECTION 1. *Definition of reciprocal insurer; doing business without license; licensing.* 1. Within the meaning of this chapter the term "reciprocal insurer" shall mean any aggregation of persons, firms or corporations, herein called "subscribers," who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate

the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term "reciprocal insurer" shall include any reciprocal or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. The term "advisory committee," as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer and which has, subject to the articles of association and subscribers agreement, ultimate power and responsibility in the management and control of the affairs of a reciprocal insurer.

SECTION 410, SUBSECTION 2. No person, firm, corporation or association as an underwriter or underwriters, and no reciprocal insurer, shall do any insurance business in this state, nor shall any person, firm, corporation or association as attorney-in-fact or other representative of any reciprocal insurer do or cause to be done within this state any act which effects, aids or promotes the doing of an insurance business in this state by any reciprocal insurer, unless authorized so to do pursuant to the provisions of this article.

SECTION 411, SUBSECTION 4. If within one year thereafter the superintendent finds, after such investigation and examination as he may see fit to make, that each subscriber has deposited in cash with the attorney-in-fact an amount at least equal to the premium specified in such declaration, and that a fund, at least equal to the amount of the minimum capital required of a domestic stock insurance company hereafter organized under the provisions of this

chapter to do the same kind or kinds of insurance business (Section 341, subsection 1(a)), has been advanced by the subscribers as a minimum surplus for policyholders, and is in the possession of the attorney-in-fact or invested subject to the control of the advisory committee, and that other requirements of this chapter applicable to such reciprocal insurer have been complied with, he may issue to such reciprocal insurer a license to do business.

SECTION 414, SUBSECTION 2. Every such existing reciprocal insurer and every authorized foreign reciprocal insurer, shall, within one year after the effective date of this chapter, have so revised its subscribers agreement and its articles of association, if any, as to conform to the requirements applicable to reciprocal insurers hereafter to be organized under the provisions of this article.